



14 June 2021

PRESS SUMMARY

Betamax Ltd (Appellant) v State Trading Corporation (Respondent) (Mauritius) [2021] UKPC 14

On appeal from the Supreme Court of Mauritius

JUSTICES: Lord Hodge (Deputy President), Lady Arden, Lord Leggatt, Lord Burrows, Lord Thomas

BACKGROUND TO THE APPEAL

This appeal concerns the extent to which a court can set aside or refuse to enforce an international arbitration award on the basis that it conflicts with the country's public policy. The appeal arises under section 39(2)(b)(ii) of Mauritius' International Arbitration Act 2008, which is based on article 34 of the UNCITRAL Model Arbitration Law.

The underlying dispute concerns a contract of affreightment (the "**COA**") entered into on 27 November 2009 between Betamax Ltd ("**Betamax**", a Mauritian company) and State Trading Corporation ("**STC**", a public company responsible for the import of essential commodities in Mauritius). Under the COA, Betamax agreed to build and operate a tanker and use it to transport STC's petroleum products from India to Mauritius. The COA was governed by the laws of the Republic of Mauritius and provided for arbitration under the Singapore International Arbitration Centre Rules. On 30 January 2015, a new Government in Mauritius announced that it would terminate the COA on the basis that the award of the contract was in breach of the Public Procurement Act 2006 (the "**PP Act**") and the Public Procurement Regulations 2008 (the "**PP Regulations**").

On 15 May 2015, Betamax filed a notice of arbitration against STC, claiming damages for breach of the COA. STC objected on various grounds, including that the COA breached Mauritian public procurement laws and was therefore illegal and unenforceable. The arbitrator disagreed with STC and made an award in favour of Betamax on 5 June 2017 (the "**Award**"), which determined that the COA was not made in breach of the Mauritian public procurement laws and Betamax was entitled to USD 115.3m in damages.

Following the Award, both parties applied to the Supreme Court of Mauritius (the "**Supreme Court**"): Betamax to enforce the Award; STC to set aside the Award for several reasons, including because the Award conflicted with the public policy of Mauritius (applying section 39(2)(b)(ii) of the International Arbitration Act 2008). The Supreme Court agreed with STC and set aside the Award. The Supreme Court focused on whether the COA was made in breach of the PP Act. It held that it was and therefore the COA was illegal; the illegality was flagrant and so the Award should be set aside as to enforce it would conflict with Mauritian public policy.

The Supreme Court granted Betamax permission to appeal to the Judicial Committee of the Privy Council (the "**Board**"). The appeal raises three issues: (1) (the main issue) was the Supreme Court entitled to review the arbitrator's decision that the COA was not in breach of Mauritian public procurement laws; (2) if the Supreme Court was entitled, was the COA illegal; and (3) if the COA was illegal, was the Award in conflict with the public policy of Mauritius?

JUDGMENT

The Board allows Betamax's appeal and enforces the Award. Lord Thomas gives the judgment of the Board.

REASONS FOR THE JUDGMENT

The Supreme Court was not entitled to review the decision of the arbitrator on the legality of the COA under Mauritian public procurement laws (issue one)

Section 39 of the International Arbitration Act, based on article 34 of the Model Law ([20-21]), permits the court of the state before which proceedings are brought to set aside an award in certain limited circumstances, including if the award conflicts with the public policy of Mauritius [13]. Betamax and STC agreed that it was for the Supreme Court to determine the nature and extent of the public policy of Mauritius [23]. They also agreed that if an arbitral tribunal decides that an agreement is illegal but makes an award which enforces the agreement, the court is entitled to set aside the award under section 39(2)(b)(ii) of the International Arbitration Act if it conflicts with public policy [39]. However, the arbitrator had interpreted the PP Act and the PP Regulations and decided that they did not render the COA illegal. Betamax and STC agreed before the Board that it was within the arbitrator's jurisdiction to determine this [22]. However, STC argued that if the arbitral tribunal had made an error of law as to the legality of an agreement in circumstances which involved the public policy of Mauritius, the Supreme Court was entitled to correct it (here, by considering afresh whether the PP Act applied to the COA) [29].

The Board rejects STC's argument. Section 39(2)(b)(ii) cannot be used to review any arbitral award on an issue of interpretation of the contract or of legislative provisions within the jurisdiction of the arbitrator where, on one possible interpretation, the result was that the agreement was illegal. The not uncommon circumstance that the law governing the disputed contract and the law of the reviewing court were the same (here, both Mauritian law), did not entitle the court to reconsider the arbitrator's decision on the question of the legality of the contract on the grounds of public policy [47]. Increasing the scope of the public policy exception in this way would be inconsistent with the purpose of the International Arbitration Act and the Model Law, which are based on the principle of finality (that where a matter has been submitted to arbitration and is within the arbitrator's jurisdiction, the decision is final whether the issue is one of law or fact) [48]. It would also be inconsistent with the case law [50].

The proper question for the court under section 39(2)(b)(ii) is whether, on the findings of law and fact made in the award, there is any conflict between the award and public policy. The interpretation of the PP Act and the PP Regulations gave rise to no issue of public policy – the issue was simply whether the COA was exempted from the procurement legislation [46]. The court cannot use the guise of public policy to reopen issues relating to the meaning and effect of a contract or whether it complies with a regulatory or legislative scheme [49].

The COA was not in breach of Mauritian public procurement laws (issue two)

As a result of the Board's conclusion on issue one, issues two and three do not arise [54, 95]. On issue two the Board nonetheless explains why, on the proper interpretation of the difficult legislative provisions relating to the scope of the exemptions set out in the PP Act and PP Regulations (as amended shortly before the COA was made), it agrees with the arbitrator rather than the Supreme Court [55-94].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at: www.jcpc.uk/decided-cases/index.html.